STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

June 3, 2002

TO: PARTIES OF RECORD IN APPLICATION 99-08-021

Enclosed are Agenda ID #169, the Modified Presiding Officer's Decision of Administrative law Judge (ALJ) Glen Walker and Agenda ID #731, the Alternate Order of Commissioner Wood to the Modified Presiding Officer's Decision. These items are scheduled for the June 27, 2002, Commission meeting.

When the Commission acts on the Agenda ID #169, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Agenda ID #169 which addresses the appeal from the Presiding Officer's Decision, is included for your convenience and pursuant to Rule 77.7(e), no comments will be accepted.

As set forth in Rule 77.6, parties to the proceeding may file comments on the enclosed alternate Agenda ID #731, at least seven days before the Commission meeting or no later than June 18, 2002. No reply comments will be accepted. An original and four copies of the comments with a certificate of service shall be filed with the Commission's Docket Office and copies shall be served on all parties on the same day of filing. The Commissioners and ALJ shall be served separately by same-day service.

/s/ CARL OSHIRO
Carl Oshiro, Interim Chief
Administrative Law Judge

CKO:mnt

Attachment

Decision ALTERNATE DRAFT DECISION OF COMMISSIONER WOOD
(Mailed 6/3/02)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Fiber Link, L.L.C. (U-6028-C) for Modification of its Certificate of Public Convenience and Necessity ("CPCN") to Review Proponent's Environmental Assessment for Compliance with the California Environmental Quality Act ("CEQA").	Application 99-08-021 (Filed August 10, 1999)

Stephen P. Bowen and Anita C. Taff-Rice, Attorneys at Law, for Pacific Fiber Link, applicant.
Stephen G. Puccini, Attorney at Law, for the California Department of Fish and Game and Catherine A. Johnson and Carol A. Dumond, Attorneys at Law, for the Consumer Services Division, protestants.

O P I N I O N

1. Summary

In this order, we determine the appropriate penalty to impose on Pacific Fiber Link (PFL), a telecommunications carrier that began trenching and installing a fiber optic system in 1998 before formally disclosing to the Commission its intention to construct those facilities and prior to the Commission's review of potential environmental impacts pursuant to the California Environmental Quality Act (CEQA), Pub. Resources Code §§ 21000-21176. In July 1999, this Commission ordered PFL to stop work until it obtained

formal CEQA review. The Commission in 1998 had yet to be asked to undertake CEQA review for this type of project. Aware that the Commission would likely serve as the Lead Agency under CEQA, and aware that the staff was working to develop the appropriate procedure for reviewing the project, PFL nonetheless began construction and continued to pursue completion of the project, until the Commission ordered it to cease. We fine PFL $378,000.

2. Background

Pacific Fiber Link, L.L.C. (PFL)[1] was formed in February 1998 with the aim of building a fiber optic telecommunications system between Seattle, Washington, and Portland, Oregon. Depending on the success of that project, PFL anticipated constructing a system into California, first extending from Portland to Sacramento and, later, to San Diego.

An attorney for PFL states that she spoke by telephone to Commission staff in April 1998 and was advised that PFL could obtain operating authority in California by using a simplified registration process. The staff member in question does not recall the conversation, but does not deny that he might have made such a statement. The registration process was available at that time to long distance carriers that were designated as non-dominant interexchange

[1] PFL, a Washington limited liability company, was formed on February 11, 1998, by Ledcor Industries Ltd. and Mi-Tech Communications for the purpose of constructing a fiber optic telecommunications network. On March 23, 1999, PFL merged into an affiliated corporation, Pacific Fiber Link Por-Sac, Inc., and the name of the surviving entity was changed to Worldwide Fiber Networks, Inc., a Nevada corporation. On June 7, 2000, Worldwide Fiber Networks changed its name to 360networks (USA) inc., a wholly owned subsidiary of 360networks, inc., a publicly traded Canadian corporation (Nasdaq: TSIX). To avoid confusion, we will refer to the company throughout this decision by its original name, or "PFL."

carriers, or NDIECs. However, the rules included with the registration form warned that the registration process was not a substitute for a more formal application for projects that were not exempt from CEQA. PFL planned to contruct a fiber optic network employing trenches and other facilities over a wide area and knew that CEQA would apply. Nonetheless, on June 17, 1998, PFL filed under the registration process for a certificate of public convenience and necessity. It did not mention its intention to construct facilities and did not take formal steps to comply with CEQA. On July 20, 1998, PFL was authorized by this Commission to conduct long distance telecommunications service in California as an NDIEC. (Decision (D.) 98-07-057.)

In 1998, PFL began assembling the local permits it would need to construct a trench along roadside rights-of-way in which to install its conduit and fiber optic cable between Portland and Sacramento. When local authorities began to inquire about PFL's CEQA compliance, PFL in September 1998 called Commission staff to ask about CEQA review. PFL was advised that the Commission had no procedure in place (at that time) for CEQA review of NDIEC applications. PFL reports that it was advised that a "batch CEQA review" was available for carriers seeking to provide competitive local carrier (CLC) service, but PFL was not eligible for this process because it did not seek CLC authority. The batch CEQA review was later discontinued in favor of case-by-case review.

Communications between PFL and the Commission's CEQA staff continued through September and October 1998, with no resolution of how PFL was to proceed under CEQA.

In early October 1998, PFL retained the services of Foster Wheeler Environmental Corporation to establish environmental rules for the planned construction and to prepare the reports that would be required for formal CEQA

review. On October 15, 1998, PFL met with the Commission's CEQA staff and was advised that staff was still exploring options for conducting an environmental review of the project. The staff further advised PFL not to begin construction until the CEQA question was resolved.

In November 1998, PFL notified the Commission's CEQA staff that PFL had obtained all necessary local permits for construction in Yolo County, California, including a Yolo County notice of exemption from CEQA requirements. PFL stated that it would begin construction in Yolo County after the Thanksgiving holiday unless the Commission directed it not to do so. At hearing, a Commission staff member testified that while he recommended that PFL wait for formal Commission action, he (the staff member) stated that he would not tell PFL not to proceed.

On December 2, 1998, PFL began trenching and installing its fiber optic cable in Yolo County. By the end of the month, it had completed 14.6 miles of installation. As part of the work, PFL also installed conduit for Yolo County's 911 telephone system without charge to the county.

On December 14, 1998, PFL by telephone notified the Commission's CEQA staff of the progress of construction and requested an in-person meeting to determine how to obtain formal CEQA approval. A meeting date was set for December 29, 1998. On December 28, 1998, PFL was advised by staff that the Commission was reviewing the matter internally, that a ruling addressing environmental review for NDIEC applicants was being considered, and that an in-person meeting therefore was premature. The meeting later was rescheduled for February 16, 1999.

PFL and the Commission's staff continued to communicate by telephone in January 1999. At hearing, a CEQA staff member testified that he had made calls

on PFL's behalf to agencies in four counties to tell them that the company and the Commission were working together to try to resolve the environmental review question. Meanwhile, work on the fiber optic project continued. By the end of January, 22.65 miles of conduit construction had been completed in Yolo and Sutter counties.

On February 16, 1999, the CEQA staff met with representatives of PFL and its environmental consultant. PFL outlined the progress of its construction and provided the environmental reports that had been conducted in Yolo, Sutter and Butte counties. PFL stated that it had adopted numerous mitigation measures to avoid interference with sensitive biological resources. According to PFL, its representative asked the Commission's chief CEQA officer whether PFL could continue construction, and he replied "Yes. You can continue doing what you have been doing." (Transcript, at 496.) At hearing, the officer stated that his response addressed continuation of the mitigation measures rather than the construction that was under way.

The Commission's CEQA staff and PFL representatives continued to communicate by telephone in March and April 1999, and during that time PFL completed 90.8 miles of construction of its project. By April, the parties had agreed that PFL should prepare a Proponent's Environmental Assessment as the first step in formal CEQA review. A proposed outline of the assessment was delivered to the Commission on April 13, 1999, by PFL's environmental consultant.

By May 1999, the Commission had retained Entrix, Inc., to conduct an initial study of the PFL project under CEQA guidelines. The Entrix team in June conducted a four-day field examination of completed and proposed work on the PFL construction route. On June 17, 1999, a project review meeting was

conducted at the Commission, and PFL was advised to file a petition to modify the operating authority that had been granted a year earlier to include environmental review and approval.

By letter dated June 25, 1999, the California Department of Fish and Game asked the Commission to issue a stop-work order on PFL's project "until proper project review and approval has been completed and appropriate environmental protections are in place." (Exhibit 13.) On July 6, 1999, the Commission's Executive Director issued a stop-work order and PFL ceased all construction. By then, it had completed a total of 131 miles of conduit.

2. Penalty Phase Proceeding

On August 11, 1999, PFL applied for a modification of its operating authority to reflect its plans to construct facilities. The application included a Proponent's Environmental Assessment, as required under Rule 17.1.

There were two formal protests to the application. The Commission's Consumer Services Division (CSD) urged that approval not be granted until CSD investigated complaints about construction that already had taken place. The California Department of Fish and Game urged a more thorough environmental analysis. It alleged that applicant had not obtained required determinations from the Department to ensure against adverse effects on fish and wildlife resources.

The Commission's CEQA staff, with the help of consultant Entrix, conducted further inspections and review of the application. On October 1, 1999, staff issued a Proposed Mitigated Negative Declaration and Initial Study. Following publication and comments, the staff issued a Final Mitigated Negative Declaration and Initial Study on November 24, 1999. The report established mitigation measures to govern the construction work and concluded that with

these measures and continued oversight, the project would not have significant effects on the environment. In light of this report, CSD withdrew its protest.

In D.00-01-022, issued on January 6, 2000, the Commission adopted the mitigated negative declaration, granted modification of applicant's operating authority to include CEQA approval, and lifted the stop work order that had been in place since July 6, 1999. However, the Commission kept this proceeding open for investigation of whether sanctions should be assessed against PFL for starting construction prior to CEQA review. The Commission stated:

> "We recognize that our stop work order has effectively shut this project down for six months, with attendant financial loss to applicant. We also recognize that applicant has taken steps to mitigate environmental damage. Nevertheless, we believe that further consideration must be given to whether this Commission should levy fines or other sanctions against applicant and its officers. (See, e.g., In Re Coral Communications, D.99-08-017, 1999 Cal. PUC LEXIS 519.) Our concern is that carriers may not have adequate incentives to comply with the law if the only penalty they face for non-compliance is the possibility of delays in construction, delays which would have occurred in the early stages of the project anyway if the carrier had complied with the law and submitted to environmental review and mitigation. Accordingly, we will keep this proceeding open to investigate whether and the extent to which fines or other sanctions should be imposed on [applicant]." (D.00-01-022, p. 12.)

The assigned administrative law judge (ALJ) was directed to "consider whether a fine or other sanctions should be imposed on applicant and its officers for commencing work without appropriate authority and in violation of the law." (D.00-01-022, Ordering Paragraph 10.) CSD, one of the Commission's major investigative units, was directed to investigate the alleged violations by PFL and, depending on the results, to prepare a case against the applicant.

In a Scoping Memo issued on March 9, 2000, Assigned Commissioner Duque identified the issues to be addressed in this proceeding as follows:

(a) Did Worldwide Fiber Networks, Inc. (formerly Pacific Fiber Link, L.L.C.) violate any provision of the California Environmental Quality Act (CEQA), any provision of the Public Utilities Code, or any other relevant law or regulation in its construction activities related to this application?

(b) Has there been any uncorrected environmental damage related to any alleged violation by Worldwide Fiber Networks?

(c) What mitigating circumstances, if any, should be considered by the Commission in assessing any alleged violations by Worldwide Fiber Networks?

(d) What sanctions, if any, should the Commission consider in evaluating this matter?

(e) What case law or other precedents should the Commission consider in evaluating this matter?

Both CSD and the Department of Fish and Game submitted direct testimony on May 26, 2000. Following a stay of proceedings to permit further discovery, PFL responded with its testimony on November 7, 2000. Rebuttal testimony was received on December 18, 2000, and five days of hearings were conducted on January 8-12, 2001. Final briefs were submitted on March 26, 2001, at which time the matter was deemed submitted for resolution. The assigned Administrative Law Judge (ALJ) issued a Presiding Officer's Decision. CSD appealed that decision, and the ALJ issued a Modified Presiding Officer's Decision. This order is an alternate to the Modified Presiding Officer's Decision.

3. Position of CSD

CSD argues that sanctions are warranted against PFL for using the registration process instead of an application for authority to operate, and for starting construction of its fiber optic project before obtaining CEQA approval. CSD investigator Stephanie Amato testified that, regardless of conflicting advice that PFL may have received from Commission staff members, PFL knew or should have known that it was not eligible to use the simplified registration process to register as a facilities-based NDIEC in California.

Amato testified that the instructions for the registration process state:

> "Only facilities which meet the requirements for exemption from the California Environmental Quality Act (CEQA) pursuant to Commission Rules of Practice and Procedure 17.1(h)(1)(A)(1) may be included in a CPCN registration. All other facilities will require a formal application."" (Exhibit 1, at 4.)

Amato testified that this instruction is on the Telecommunications Division webpage and is printed out along with the two-page registration form. The rule also is stated in the Commission decision establishing the registration process. (*Re Simplified Registration Process for Nondominant Telecommunications Firms* (1997) D.97-06-107, 73 CPUC2d 288, 298.) The referenced Rule 17.1(h)(1)(A)(1) provides an exemption only for restoration and repair of existing structures where the damage is not substantial, an exemption not applicable to PFL.

According to CSD, PFL should have known that it was ineligible to use the simplified registration procedure and therefore was required by Rule 17.1 to file a formal application with an accompanying Proponent's Environmental Assessment (Rule 17.1(c) and (d)).

CSD also presented the testimony of three Commission staff members who had dealt with PFL: Joseph McIlvain, regulatory analyst responsible at the time for dealing with NDIEC applications; John Boccio, regulatory analyst in the Environmental Projects Unit of the Commission's Energy Division; and Andrew Barnsdale, environmental programs manager.

McIlvain testified that he receives hundreds of calls from telephone company representatives and he did not recall details of calls from PFL representatives in 1998. On cross-examination, however, he stated that the Commission, as of 1998, had not performed CEQA reviews for applicants seeking only NDIEC authority, and he was likely to have advised callers to check the Commission's web site and use the simplified registration form. McIlvain said that the policy changed in 1999, and he began telling "facilities-based" NDIEC applicants that they would have to file an application and comply with CEQA requirements. Facilities-based carriers are those that use their own facilities rather than those of other telephone companies. McIlvain said that only about 20 or 30 of the 738 NDIECs registered with the Commission in January 2000 were facilities-based.

Boccio testified that he had many conversations in 1998 with Anita Taff-Rice, an attorney for PFL. He said that he told her that CEQA review for facilities-based long distance carriers was a "gray area," and no definitive policy was in place at that time. He said that Taff-Rice argued that the authority already granted to PFL should be sufficient to permit construction in roadside rights-of-way. Boccio further testified that he and Barnsdale counseled PFL not to begin construction until the CEQA question was resolved.

On cross-examination, Boccio stated that the CEQA unit in 1998 dealt primarily with energy utilities, and PFL was the first NDIEC telephone applicant

to seek CEQA review. He stated that he had explored many options for handling the matter administratively, including the use of the "batch processing" review that was in place for competitive local carriers. (The batch processing of CLC applicants with construction plans took place on a quarterly basis and involved a blanket mitigated negative declaration for all of the carriers. This process was discontinued in 1999 and replaced with a case-by-case review of applicants.) Boccio testified that he worked cooperatively with PFL trying to resolve the CEQA question, and that he made a number of phone calls on PFL's behalf to other agencies.

Like Boccio, Barnsdale testified that PFL's CEQA status was a case of first impression for his unit in 1998. He said that PFL's decision to begin construction on December 6, 1998, was done at the company's initiative and at its own risk. On cross-examination, he acknowledged that incumbents like Pacific Bell, AT&T and cellular carriers are not subject to CEQA review for new facilities construction for various reasons, including claims of exemption, and that differing degrees of CEQA oversight applied in 1998 to new entrants in the telecommunications market depending on the type of service they planned to offer.

In testimony on behalf of the California Department of Fish and Game, James R. Nelson, described his investigation as a conservation supervisor of PFL's trenching in state park areas. He stated that PFL had begun directional drilling and installation of conduit under parkland streams without obtaining streambed alteration agreements from the department. Nelson stated that PFL's permit coordinator told him that the company had completed CEQA review as part of the authority granted by the Commission, a statement that Nelson determined was untrue. Nelson testified that he was particularly concerned with

PFL's failure to clean up spills of betonite, a clay-like drilling substance that in large quantities can adversely affect fish and aquatic organisms. While the Fish and Game Department eventually entered into an agreement with PFL for its drilling operations, Nelson and his manager reported their concerns about the CEQA status of the project to the Commission in June 1999. The Commission's stop-work order issued shortly thereafter.

4. Position of PFL

PFL presented its evidence through the testimony of two environmental specialists retained by the company to monitor the conduit project, two corporate officers who had directed the project, and two attorneys who had dealt with the Commission on CEQA issues. By stipulation, PFL also introduced the deposition transcripts of six wardens for the Department of Fish and Game.

R. John Little, president of Sycamore Environmental Consultants, Inc., and James K. Nickerson, western region science manager for Foster Wheeler Environmental Corporation, testified that their companies were retained by PFL in September 1998 to conduct environmental reviews of the fiber optic project. They stated that they prepared a comprehensive plan to protect sensitive biological, archeological and historical resources along the construction route and worked with local and state agencies to obtain required permits.

Both witnesses testified that they determined that the Commission was the lead agency for CEQA purposes, but that there appeared to be uncertainty within the Commission about what CEQA obligations applied to an NDIEC like PFL. Nickerson stated that he met with the Commission's environmental staff and that "they were aware of, and approved of, the environmental studies being performed in support of the project." (Exhibit 15, at 7.) He said that the Commission's staff appeared to have no problem with the construction taking

place on the rights-of-way of public roads and utilities, but told him that further Commission authorization would be required for regeneration facilities that later would be constructed outside the rights-of-way. Little testified that it was his belief that some sort of paper solution would take place that would satisfy the earlier CEQA requirements for the Commission.

Nickerson testified that PFL obtained all necessary approvals from the Department of Fish and Game, adding that at least two of the department's regional offices had agreed that streambed alteration agreements were not required because PFL planned to drill under waterways and not affect streambeds or banks. He testified that he was not aware of uncorrected betonite spills.

PFL's vice president of planning, James Cox, testified that he thought that the operating authority that the company obtained from the Commission in July 1998 included CEQA authority. He said he knew of three other telecommunications companies that were building fiber optic systems in California and had CEQA approval from the Commission. He learned later that these were competitive local carriers that had obtained their authority under the blanket mitigated declaration process that has since been discontinued. Cox stated that when PFL failed to receive guidance from the Commission on obtaining CEQA approval, the company put together its own environmental review of the project.

In similar testimony, PFL's vice president of operations, Gary D. Anderson, said the company had sought Commission action on CEQA for months. He said that PFL decided to proceed with construction in December 1998 because all local permits were in place, all construction crews had been hired, Yolo County had issued a CEQA exemption for the work, and the word

from Commission staff was that the Commission would not stop PFL from beginning work.

Asked in cross-examination about the costs of the Commission's stop-work order between July 1999 and January 2000, Cox testified that losses were not large in terms of the total project value. Anderson, however, estimated that the stop-work order cost PFL approximately $1 million, but he was unable to quantify the loss.

PFL called two lawyers, Julie Hawkins and Anita Taff-Rice, to recount their experiences in dealing with the Commission. Hawkins, practicing with a law firm in Seattle at the time, testified that she was assigned to file for PFL's authority in California in April 1998. She said that she called the Commission's staff on at least 10 occasions and was told to file a registration and not an application for PFL. She said that she was told that the Commission did not do a CEQA review for long distance carriers like PFL. Hawkins said that this did not surprise her because her filings in seven other states had not required environmental review.

On cross-examination, Hawkins acknowledged that she kept no notes of her conversations with Commission staff. She admitted that the two-page registration form she filed on behalf of PFL did not include a description of the fiber optic project, although it did specify that PFL was a facilities-based carrier.

Both Hawkins and Taff-Rice testified that they had reviewed the Commission's Rule 17.1 dealing with the preparation and filing of environmental reports. Both stated that they found the instructions unclear and sought guidance from McIlvain and others on the Commission staff. On cross-examination, Taff-Rice said she found McIlvain "extremely knowledgeable and

very helpful," and thus she had no reason to doubt the filing procedures he described. Taff-Rice went on to state:

> "There were other carriers out there doing precisely what we contemplated and yet they apparently didn't need an exemption and were not filing full-blown [Proponent's Environmental Assessments]. So we tried to read the rule and compare that to what I knew was going on in the real world." (Transcript, at 746.)

5. CSD Recommendations on Sanctions

CSD argues that a preponderance of the evidence shows that PFL in using the simplified registration process instead of an application violated Rule 1 of the Rules of Practice and Procedure ("never to mislead the Commission or its staff by an artifice or false statement of fact or law") and Rule 18 (requirements for filing an application for a Certificate of Public Convenience and Necessity). In starting construction before the Commission had conducted CEQA review, PFL is alleged to have violated Rule 17.1. Rule 17.1 sets forth the requirements for preparation and submission of environmental impact reports. CSD also alleges a violation of Pub. Util. Code § 702, which requires every public utility to comply with the orders, decisions and rules of the Commission.

Under Pub. Util. Code § 2107, the statutory range of Commission penalties is from $500 to $20,000 for each offense. Each day of violation is considered a separate violation. (Pub. Util. Code § 2108.) CSD thus calculates that the penalty for constructing without authority for 216 days from December 2, 1998 to July 6, 1999, could range from $108,000 to $4,320,000.

The Commission has established criteria for determining the size of fines in *Re Standards of Conduct* (1998) D.98-12-075, 190 P.U.R.4th 6. In general, the Commission considers severity of the offense, the conduct of the utility, the

financial resources of the utility, and the totality of the circumstances in the particular case. In addition to these criteria, CSD suggests that the Commission may consider factors in mitigation of a penalty, including the lack of a clear policy in 1998 for dealing with environmental review of telecommunications carriers.

Taking all of these factors into account, CSD recommends a fine in the middle to lower end of the statutory range, or from $1 million to $2 million, depending on the degree of mitigation that the Commission deems appropriate.

6. Discussion

Section 2107 sets a range of penalties for a utility that violates or fails to comply with an order, decision, rule, demand, or requirement of the Commission in cases such as this, where there is no other statutory penalty. The penalty must be "no less than five hundred dollars" for each offense and can be "no more than $20,000" for each offense. Section 2108 states that, in the event of a continuing violation, each day's continuance represents a separate and distinct offense. Where the Commission finds violations, this statutory scheme gives the Commission discretion to impose a penalty of anywhere from $500 to $20,000 per offense. It does not give the Commission discretion to impose a penalty of less than $500 or more than $20,000 per offense.

The Commission has created criteria for determining the appropriate penalty for a given situation within that range. The Commission initially crafted these criteria, as set forth in Appendix A to Decision (D.)98-12-075 (Penalty Guidelines), for use in reviewing violations of Affiliate Transactions rules, but has applied them in other contexts where penalties are under consideration. In his Modified Presiding Officer's Decision, the ALJ finds violations and applies these criteria, but concludes, for various reasons, that it is appropriate to reduce

the penalty to zero. This is inconsistent with the statutory scheme and with the goal of the Penalty Guidelines. In addition, it fails to reflect the fact that PFL's violation of our rules and applicable statutes is not fully excused by the evolving nature of the telecommunications industry or by contrary advice the utility may have obtained from members of the Commission staff.

PFL violated Rule 1 of the Commission's Rules of Practice and Procedure by failing to disclose, in its application for CPCN, that it planned to construct new facilities as part of its facility-based telecommunications service. It violated Rule 18 for failing to include, in its application for a CPCN, a description of the facilities it planned to construct and a map of the location of the facilities. It violated Rule 17.1 for failing to include a Proponent's Environmental Assessment with its application for a CPCN, or in the alternative, failing to file a motion seeking the Commission's determination of the applicability of CEQA to its project. It violated Public Utilities Code Section 702 by failing to comply with these rules and for failing to follow the Commission's directive to use a standard application, and not the abbreviated registration process, for a project that is not exempt from CEQA. Can these violations be entirely forgiven because of the evolving nature of telecommunications regulation in California and potentially inconsistent advice from members of the Commission's staff? The applicable statutes and the Penalty Guidelines suggest otherwise.

We will first address the basis for each of these violations and then apply the Penalty Guidelines to determine the appropriate penalty.

a) Violations of Rules and Statutes

(1) Rule 1

Rule 1 of the Commission's Rules of Practice and Procedure provides:

"Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law."

By failing to inform the Commission, as part of its request for CPCN, that it planned to construct extensive telecommunications facilities, PFL misled the Commission by leaving it to assume that the company would rely on existing facilities to provide its facilities-based service.

The ALJ concludes that PFL lacked the requisite intent, recklessness or gross negligence with regard to its communications with the Commission to be in violation of Rule 1 because PFL informed certain members of the Commission's staff that it planned to construct facilities. Below, we will discuss whether PFL's conversations with staff members tend to mitigate the appropriate penalty. The fact remains that PFL communicated with the "Commission" in at least two different ways: through its informal staff contacts and through its formal pleadings.

Regardless of what it told the staff informally, PFL was obligated to provide complete and accurate information to the Commission through its formal pleadings. Otherwise, any utility could circumvent the obligation to provide truthful pleadings by simply informing a staff member of the complete or truthful story. It is not the staff's obligation to track the accuracy of all formal pleadings, compare the statements in those pleadings with informal comments made to the staff, and inform the commissioners of any discrepancies. It is not an applicant's privilege to decide when and how to disclose information to the Commission. As discussed below, the Commission's rules direct an applicant to provide complete information about its construction plans. Any applicant before

this agency is presumed to be familiar with these rules. A failure to provide critical information in formal pleadings, when that information is reasonably available to the utility, is either an intentional act, or a negligent one. In either case, it is in violation of Rule 1.

(2) Rule 18

This rule provides, in part, that any new utility seeking a CPCN to construct new facilities include in its application:

(a) A full description of the proposed construction or extension, and the manner in which the same will be constructed, and

(c) A map of suitable scale showing the location or route of the proposed construction or extension, and its relation to other public utilities, corporations, persons, or entities with which the same is likely to compete.

PFL failed to provide any of this information with its request for a CPCN.

(3) **Rule 17.1**

This rule governs the environmental review under CEQA of requests for discretionary approval by the Commission. Section (d) states that "the proponent of any project subject to this rule shall include with the application for such project an environmental assessment which shall be referred to as the Proponent's Environmental Assessment (PEA)." PFL did not provide a PEA with its application.

For those entities that may be confused about the applicability Rule 17.1, section (e) (2) provides that project proponents may file a motion for determination of whether the proceeding involves a project subject to or exempt from CEQA. Section (e)(1)(A) enables project proponents to file a motion for determination of whether the Commission is the Lead Agency for purposes of CEQA and rule 17.1. Apparently, PFL was confused as to the applicability of

CEQA, as it discussed CEQA compliance with members of the staff on various occasions. However, despite the apparent ambiguity of the staff response (which included the advice that PFL not proceed with construction until CEQA procedures were clarified), PFL did not seek formal guidance from the Commission. Instead, it chose to bear the risk of constructing its project without Commission approval, without environmental review, and without closure concerning its CEQA concerns.

(4) Public Utilities Code Section 702

Section 702 requires that every public utility "obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents and employees." In violation of Section 702, PFL failed to comply with all of the rules discussed above.

In addition, PFL failed to comply with the direction provided in D.97-06-107, which reiterated the rules accompanying the registration materials. Those rules provide that entities should not use the abbreviated registration process unless their facilities are exempt from CEQA. All other facilities require a formal application. Although the Commission had not determined whether PFL's project was exempt from CEQA (apparently, not even PFL had concluded that it should be exempt), PFL still registered for a CPCN, instead of filing a more formal application. The improper use of the registration option comprises an additional violation of Section 702.

b) Range of Potential Penalties

Pursuant to Section 2108, each day of an ongoing violation is an ongoing offense. PFL began its violations when it commenced construction without Commission permission, on December 2, 1998. Violations continued until PFL ceased construction activities on July 6, 1999, 216 days later. Under Section 2107, which provides for a fine of $500 to $20,000 for each offense, PFL must be fined no less than $108,000 and no more than $4,320,000.

c) Determining the Appropriate Penalty Within the Statutory Range

The Commission has set forth criteria for considering penalties in an unrelated context, in D. 98-12-075, and we find those criteria illustrative here. Those criteria, and our assessment of PFL's conduct in light of them, follow.

1. Physical Harm

According to D.98-12-075, the most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following. PFL's actions in engaging in construction activities without CEQA review threatened environmental harm and may have led to unmitigated betonite spills. While there is no conclusive evidence of actual harm to the environment, this criterion nonetheless recognizes the need for penalties even where actions threaten, but do not cause, harm. On balance, we find that this factor militates against a decrease in the amount of the penalty.

2. Economic Harm

According to D.98-12-075, the severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the Applicant. Generally, the greater of these two amounts

will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

There is no evidence of costs imposed on victims of the violation, but PFL may have gained benefits by commencing construction sooner than it would have if it had complied with all applicable laws, creating a potential advantage over competitors that chose to follow all of the Commission's rules. This factor militates in favor of an increase in the penalty.

3. Harm to the Regulatory Process

A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements. Despite its informal communications with Commission staff, PFL failed to afford the Commission a formal opportunity, in advance, to carry out its obligations under CEQA. While PLF makes much of its uncertainty as to how the Commission wished to carry out those obligations, PFL did not avail itself of the procedural vehicles provided in Rule 17.1 to overcome any such ambiguity.

Even if PFL provided the Commission with a case of first impression as to how to review the construction plans of an NDIEC, this does not provide an excuse for the company to take matters into its own hands, and begin construction without environmental review. Rule 17.1 recognizes that there may be new twists or ambiguous obligations and enables applicants to seek the Commission's guidance through appropriate motions. Rather than pursuing this course, PFL chose to begin construction at its own risk and without formally notifying the Commission of its intentions. Such action warrants an increase in penalties.

4. The Number and Scope of the Violations

Under D.98-12-075, a single violation is less severe than multiple offenses. As explained above, each of the 216 days during which undertook construction without Commission approval represents a separate offense. This factor supports the imposition of a larger, rather than a smaller penalty.

5. The Applicant's Actions to Prevent a Violation

The next D.98-12-075 criterion provides that applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The Applicant's past record of compliance may be considered in assessing any penalty. Despite PFL's violations, the record indicates that PFL did make extensive efforts to determine, with the assistance of Commission staff and its environmental consultants, the appropriate actions to take in order to comply with the law. This factor supports a reduction in the penalty.

6. The Applicant's Actions to Detect a Violation

According to D.98-12-075, applicants are expected diligently to monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty. In this case, PFL knowingly proceeded without CEQA authorization. While it appears that PFL may have been confused about its obligations in this regard, its unilateral decision to commence construction was risky and improper. We find that this factor warrants an increase in the penalty.

7. The Applicant's Actions to Disclose and Rectify a Violation

Applicants are expected promptly to bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an Applicant promptly and cooperatively to report and correct violations may be considered in assessing any penalty. As we note in the Background section of

this decision, PFL began trenching work on December 2, 1998 and informed members of the Commission staff of the steps that it had taken on December 14, 1998. We find that this was prompt disclosure, as far as it goes. However, PFL continued to construct its facilities even as it continued to receive mixed signals from the staff. PFL did not formally notify the Commission or avail itself of the procedural tools provided in Rule 17.1 for clarifying responsibilities under CEQA. Instead, PFL continued to construct facilities until the Department of Fish and Game raised concerns and the Commission ordered it to cease construction. On balance, the mitigating and exacerbating facts related to this factor cancel one another out and warrant no change in the penalty.

8. Need for Deterrence

Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the Applicant in setting a fine. PFL provided confidential financial information as part of its application. We set the penalty with this financial information in mind. As part of this consideration, we take official notice that on June 26, 2001, PFL filed for bankruptcy in the United States and Canada.

Under Pub. Util. Code § 2107, each violation carries a potential fine in the range of $500-$20,000 per violation. As noted above, we find that each day during the period when un-permitted construction took place constitutes a separate offense. This period ran for 216 days. We believe a fine of $1,750 for each day is appropriate. This calculation results in a fine of $378,000.

9. Constitutional Limitations on Excessive Fines

Under D.98-12-075, the Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each Applicant's financial resources. We have set the penalty with this principle in

mind.

10. The Degree of Wrongdoing

In setting penalties, the Commission reviews facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing. In this case the facts that mitigate and exacerbate the wrongdoing are the following:

Mitigating Facts:

- No clear record of actual environmental harm;
- Ongoing discussions with Commission staff about the appropriate means for assuring compliance with CEQA
- Mixed messages received from members of the Commission staff about the appropriateness of proceeding with construction in the absence of CEQA review
- Ambiguity about the procedures that apply to the considering of a CPCN for a telecommunications company such as PFL
- Prompt disclosure to members of the Commission staff that work had been performed.

Exacerbating Facts:

- PFL's failure to comply with Commission rules such as Rule 17.1 and Rule 18; by complying with these rules, PFL could have overcome any ambiguity about its obligations under CEQA
- Failure to formally notify the Commission of its plans to construct its own facilities and failure to describe the nature and scope of its construction plans
- Benefits PFL may have gained from early construction without CEQA review;
- Harm to the regulatory process by PFL's unilateral decision to construct its facilities without Commission approval and without review under CEQA

11. The Public Interest

Under D.98-12-075, in all cases, the harm will be evaluated from the perspective of the public interest. In our view, it is in the public interest for applicants planning construction with potential environmental impact to inform the Commission fully of its plans and to wait for a Commission determination of the need for CEQA review, rather than making unilateral decisions to undertake construction. CEQA benefits the public at large by ensuring proper environmental review prior to construction of projects with potential impacts on surrounding areas. Thus, it is in the public interest for us to penalize PFL to deter such future unilateral action.

12. The Role of Precedent

The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome. We are aware of one decision involving similar, although not identical, circumstances. In D.01-10-001, the Commission fined the Pacific Pipeline System $105,000 for constructing fiber optic cable facilities without prior Commission approval and without prior environmental review pursuant to CEQA. Pacific Pipeline unilaterally concluded that CEQA did not apply to its project and proceeded without first informing the Commission and without seeking clarification of its CEQA requirements as provided in Rule 17.1.

Without authorization, Pacific Pipeline had installed 60 pull-down boxes. The Commission treated each installation as a separate offense. Based on various mitigating factors, the Commission fined Pacific Pipeline $1,750 for each offense, leading to the total of $105,000. In this proceeding, we recognize several mitigating factors, including potential ambiguity in procedures for processing applications such as PFL's, and impose an identical fine of $1,750 for each

offense. Because there are 216 offenses, the total fine is $378,000, a figure that is directly comparable to the fine imposed in the Pacific Pipeline proceeding.

7. Scope of Proceeding

In Resolution ALJ 176-3022, dated September 2, 1999, the Commission categorized this application as ratesetting. In D.00-01-022, dated January 6, 2000, we determined that hearings were necessary in Phase II of this proceeding. By Scoping Memo dated March 9, 2000, Phase II of this proceeding was recategorized as adjudicatory. The scope of this proceeding was set forth in the Scoping Memo of March 9, 2000. Our order today confirms these determinations and confirms that Administrative Law Judge (ALJ) Walker is the presiding officer.

8. Changes from the Modified Presiding Officer's Decision

Rule 8.2(g) states that when the Commission issues a decision in an adjudicatory proceeding that differs from the decision prepared by the Presiding Officer, the ultimate decision shall include, or be accompanied by, an explanation of all of the changes made to the Presiding Officer's decision. An explanation of the changes follows.

1. The Summary has been revised to reflect a different outcome. While the Modified Presiding Officer's Decision concluded that mitigating factors should reduce the fine to zero, we find, herein, that mitigating factors reduce the fine to $378,000 from the potential maximum fine of $4,320,000. The factors leading to this conclusion are thoroughly discussed in the Discussion section.
2. The Background section was revised, slightly, to clarify that some of the factual characterizations can be attributed only to one party and to remove the statement that, for the most part, the facts in

this case are not in dispute. A review of the pleadings and the record indicate that various facts remain in dispute.

3. The Discussion section is entirely redrafted. The ALJ's discussion dwells on the evolving state of the telecommunications industry and the Commission's efforts to perfect its compliance with CEQA, analyzes each of the rules and code sections with which PFL may not be in compliance and then discusses, in a general way, factors that tend to mitigate the potential fine. In this order, we also analyze each of the rules and code sections with which PFL may not be in compliance, but then we undertake a factor-by-factor analysis of the various criteria previously adopted by the Commission for determining the appropriate penalty to apply within the statutory range.

(1) The ALJ concludes that PFL did not violate Rule1 (misleading the Commission) by failing to formally report to the Commission on its construction plans because its counsel had described the construction plans to a Commission staff member, mentioned on its registration form that it would be a facility-based carrier, and lacked intent to mislead, recklessness, or gross negligence in regard to its communications. This order concludes that PFL did violate Rule 1 because an applicant using the abbreviated registration form is inferring that it will not be construct facilities that are not exempt from CEQA, because mentioning something to a staff member does not substitute for including required information in an application, because a facility-based carrier may not necessarily be constructing new facilities, and because

the failure to follow proper procedures in this instance must be either intentional or negligent.

(2) The ALJ finds that PFL violated Rule 17.1 and Section 702. We agree, and amplify the discussion of the basis for finding these violations. In addition, we find that PFL violated Rule 1 and 18, for failing to include, in its application, such information as a full description of its proposed construction or extension and a map showing the route of its proposed construction. It is instructive that PFL argues that it did not violate Rule 18 because it provided some of this information to members of the Commission staff. Rule 18 expressly states that the information must be provided in the application.

(3) In this order, we have added a factor-by-factor discussion of the basis for determining where, within the statutory range, an appropriate fine would fall. The ALJ did not directly address the various factors previously established by the Commission for this purpose. In addition, the ALJ concludes that it is appropriate to mitigate the fine down to zero. We find that this is outside of the boundaries established by the Legislature, which has defined both a maximum and a minimum penalty. We have substantially reduced the fine ($378,000 out of a possible $4,320,00) for many of the same reasons the ALJ chose to completely eliminate the fine. However, we find that in failing to adhere to the Commission's written rules and direction (while relying, instead, on informal discussion with members of the staff), PFL not only violated those provisions, but failed to take steps that could have

eliminated any confusion the company may have had about its regulatory responsibilities. In light of these violations, we find it unacceptable to impose no fine at all, as the ALJ suggests.

4. We have revised the Findings of Fact in two ways, first, eliminating findings that were either not critical to the outcome of the proceeding, or that did not address ultimate facts. In addition, we have eliminated the ALJ's finding (#4) that stated that "PFL informed the Commission of its plans for installation of a fiber optic system at the time of its registration." This statement would only be true if one concludes that informing an individual member of the staff is the same thing as informing the Commission. Rules 17.1 and 18 and the instructions accompanying the abbreviated registration materials make it clear that informing the Commission involves including certain kinds of information in a formal application before the Commission. The record shows that PFL failed to inform the Commission as required.

5. We have revised the Conclusions of Law and Ordering Paragraphs to reflect the conclusion that PFL should face a fine for violating the Commission's rules and Section 702. Since the ALJ had concluded otherwise, various changes were necessary, including the insertion of instructions as to how PFL should pay the fine and inform the Commission that it has done so.

Comments

The Commission mailed the alternate draft decision of Commissioner Wood in this matter to the parties in accordance with Pub. Util Code § 311(g)(1)

and Rule 77.6 of the Rules of Practice and Procedure. Comments were filed by _____ and reply comments by _____.

Findings of Fact

1. PFL on June 17, 1998, filed a registration form seeking a certificate of public convenience and necessity to operate in California as an NDIEC.

2. PFL planned construction of a fiber optic project between Portland and Sacramento, but did not formally notify the Commission of its intention, or include construction-related information in its filing.

3. PFL filed under a simplified registration process that in 1998 was used for carriers filing only as NDIECs.

4. In its registration, PFL identified itself as a facilities-based NDIEC, but did not report on its intention to construct new facilities.

5. PFL was advised by Commission staff that the Commission had no procedure in place at that time for CEQA review of NDIEC applications.

6. PFL began construction of its fiber optic conduit project at a time when it knew or should have known that Commission approval under CEQA was required and had not yet been obtained.

7. In October 1998, PFL retained the services of Foster Wheeler Environmental Corporation to establish environmental rules for the planned construction.

8. PFL reviewed its environmental plans and its construction plans with the Commission's CEQA staff.

9. On December 2, 1998, PFL began trenching and installing its fiber optic cable in Yolo County.

10. On June 25, 1999, the California Department of Fish and Game urged the Commission to issue a stop-work order on the PFL project until CEQA review was complete.

11. A stop-work order was issued by the Commission's Executive Director on July 6, 1999.

12. The Commission in D.00-01-022, issued on January 6, 2000, granted modification of applicant's operating authority and lifted the stop-work order.

13. The Commission kept this proceeding open to investigate whether sanctions should be assessed against PFL for starting construction prior to CEQA review.

14. CSD conducted an investigation and recommended that sanctions should be imposed.

Conclusions of Law

1. The evidence supports a finding that PFL violated Rule 1, Rule 17.1, Rule 18 and D.97-06-107 in using the registration process instead of an application for its initial filing, and in failing to notify the Commission formally of its intention to construct new facilities.

2. PFL violated Rule 17.1 and Pub. Util. Code § 702 in starting construction of its project prior to receiving approval from the Commission under CEQA.

3. Based on the record as a whole, assessment of a fine of $378,000 against PFL is warranted for the violations noted above.

O R D E R

IT IS ORDERED that:

1. Pacific Fiber Link, L.L.C. (PFL) is assessed a penalty of $378,000 payable to the General Fund within 30 days of the effective date of this order.

2. Upon making such payment, PFL shall file an advice letter with the

3. Commission Telecommunications Division attaching a cancelled check or other proof of satisfaction of the penalty obligation we impose in this decision.

4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.